United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7145

To be argued by
Eric Rosenfeld

United States Court of Appeals

For the Second Circuit

B
P/S

BISWANETH HALDER,

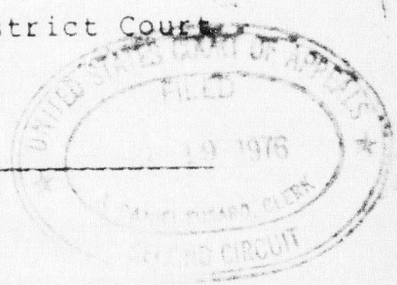
Plaintiff-Appellant,

against

SPERRY RAND CORPORATION,

Defendant-Appellee.

Appeal from a Judgment of the United States District Court
for the Eastern District of New York



A P P E L L E E ' S B R I E F

POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
Attorneys for Defendant-Appellee
777 Third Avenue
New York, New York 10017
(212) 686-3200

Of Counsel:
Eric Rosenfeld

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UNITED STATES COURT OF APPEALS

For the Second Circuit

Docket No. 76-7145

BISWANETH HALDER

Plaintiff-Appellant,

against

SPERRY RAND CORPORATION

Defendant-Appellee.

APPELLEE'S BRIEF

STATEMENT OF THE CASE

Plaintiff-appellant's ("Halder") national origin is India. He arrived in this country from England on May 31, 1969. He unsuccessfully applied by mail three times to defendant-appellee ("Sperry Rand") at its Executive Offices for employment as a computer programmer, in 1968, 1969 and 1970, respectively. He unsuccessfully applied 14

other times to eight of Sperry Rand's 425 operating facilities throughout the United States, on 14 different dates during 1969-74, 12 times by mail, the 8th time by telephone (D 9, par. 5.K, p. 4),* the 11th time in person (D 9, par. 5.O, p. 5). He has unsuccessfully applied an uncounted number of times to "hundreds" (D 34, p. 12) of other companies for such employment. He has not worked in this country as a computer programer since July 1970.

Halder appeals from a judgment of the District Court (Mishler, C. J.), entered February 13, 1976, dismissing his second amended alleging that Sperry Rand denied him employment because of his national origin, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. Dismissal was on the ground that the action came on for trial and Halder failed to proceed. Halder also appeals from the District Court's denial of his pre-trial motions to compel answers to interrogatories and for leave to file a third amended complaint (D 25). Halder has appeared pro se from the

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* Since Halder has been permitted to file the docket sheet from the District Court in lieu of a printed appendix, reference to the record will be by document number on the docket sheet, and by page: "D , p. ".

commencement of the action; all of his papers have been handwritten.

The action was commenced on July 18, 1974, one month after the United States Equal Employment Opportunity Commission ("EEOC") dismissed Halder's charge filed with it February 23, 1971, in respect to the three employment applications sent to Sperry Rand's Executive Offices in 1968, 1969 and 1970, on the ground that the charge was timely only as to the 1970 application (D 21, Ex. A, p. 1; D 34, p. 28), and that there was no reasonable cause to believe that Sperry Rand had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq. ("Title VII") (D 21, Ex. A, p. 2).

Halder's original complaint, like all his complaints, is obviously and essentially a handwritten copy of a form complaint, with blanks filled in or checked. It alleged "the address at which you sought employment" from Sperry Rand as 1290 Avenue of the Americas, New York, New York (D 1, par. 4, p. 2), and that Sperry Rand's failure to employ him was discrimination in violation of Title VII "with respect to the following: E. Your national origin" (D 1, par. 10, p. 4). Sperry Rand answered that complaint on August 13, 1974 (D 3), deposed

Halder on September 19 and October 9, 1974, consented to two successive amended complaints (D 5A and D 9), and answered them on November 7, 1974 (D 8) and December 31, 1974 (D 15) respectively. Both of the amended complaints (D 8 and D 15) confined themselves to alleging discrimination in violation of Title VII on the ground of national origin.* The second amended complaint (D 9) added the eight Sperry Rand operating facilities in addition to 1290 Avenue of the Americas as locations where he had sought employment (D 9, par. 4, pp. 2-3), and added the 14 dates on which his applications to those eight facilities had been rejected (D 9, par. 5, pp. 3-5).

The action against Sperry Rand is the first-brought of eight actions brought in the District Court

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* The second amended complaint contains the following Paragraph 10 (D 9, p. 9):

10. Defendant's conduct is discriminatory with respect to which of the following:

A) ___ your race

B) ___ your color

C) ___ your sex

D) ___ your religion

E) ✓ your national origin

for the Eastern District of New York by Halder against companies for not hiring him as a computer programmer -- all eight allege discrimination in violation of Title VII on the ground of his national origin -- which on February 5, 1976 the District Court noticed for consolidated trial on February 19, 1976 (D 28).*

In the year and a half from the commencement of the action against Sperry Rand to February 10, 1976, Halder made motion after motion to the District Court in the eight actions (D 34, p. 19).** The District Court's

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* As of February 10, 1976, the number of Halder's cases against companies for not hiring him was up to 11 (D 34, p. 19; see D 35).

** The following chart shows at a glance the motions made by Halder against Sperry Rand in the District Court, in the order made, and their disposition:

Motion	Disposition
D 5A - for leave to amend complaint	consented to
D 10 - for Sperry Rand at its expense to furnish plaintiff a copy of the transcript of its deposition of plaintiff	denied from bench
D 9 - for leave to amend complaint	consented to
D 19 - to compel answers to interrogatories	granted in part, denied in part (D 22)

denial of two of his motions against Sperry Rand is being appealed in this case, in addition to the dismissal for failure to proceed.

First, Halder is appealing the District Court's denial (D 22) of his motion (D 19) to compel answers to his interrogatories 2, 3, 5, 6 and 9 (D 17) -- Sperry Rand had answered his interrogatories 1 and, in part, 2, 3, 6, 7, and 8; the District Court directed Sperry Rand to answer interrogatories 7 and 8 in a manner indicated -- and its further denial (D 29) of his motion (D 23) for reargument of that motion.

Second, Halder is appealing the District Court's denial (D 29) of his motion (D 23) for leave to amend his second amended complaint so as to allege that Sperry Rand

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Motion		Disposition
D 23 -	to suppress deposition transcript filed Dec. 31, 1974 on ground that defendant's attorneys altered it	ignored
-	for leave to amend complaint to add color, religion and alienage, and 42 U.S.C. § 1981.	denied (D 29)
-	for reargument of motion to compel answers to interrogatories	denied (D 29)

discriminated against him on the grounds of color, religion and alienage (in addition to national origin), and that Sperry Rand violated 42 U.S.C. § 1981 (in addition to Title VII).

On February 10, 1976, the date noticed for consolidated trial of the eight actions, Sperry Rand (and two other defendant companies) stated that it was ready for trial (D 34, p. 4). When Halder refused to proceed, on the ground that the District Court had denied him necessary discovery (D 34, p. 12), Sperry Rand moved to dismiss (D 34, p. 13). The Court then directed Sperry Rand and the other two ready defendant companies "to put your cases in ... as if he testified in the manner in which he related his claim" (D 34, p. 24). Sperry Rand did so, and the Court dismissed (D 34, p. 37).

Halder is appealing that dismissal for failure to proceed.

Judgment was entered February 13, 1976 (D 30). Notice of appeal was filed March 12, 1976 (D 33).

STATEMENT OF FACTS

1. Plaintiff. Halder is a person whose national origin is India. In his motion for leave to allege color

and religion as grounds on which Sperry Rand discriminated against him, he gives his color as "non-white" and his religion as "non-christian" (D 23, p. 3, par. 4 of Halder affidavit). Plaintiff's resume mailed to Sperry Rand's Executive Officers in July 1970, put in evidence at the "trial" (Sp. Rand Ex. A), it states Halder's "Nationality" as "Indian (Permanent Resident in the U.S.)," but does not otherwise state or suggest his color or religion That resume lists four brief periods of employment, aggregating 2-1/2 years, with four different firms as a computer programmer: 10 months through June 1968 with International Computers Limited, and 11 months through May 1969 with Honeywell Limited, both in England; six months through December 1969 with Penta Computer Associates in New York, and three months (through July 1970) with Darus Dat-Com Limited in Wayne, New Jersey. The resume does not show any prior experience with computers manufactured by Sperry Rand's own Univac Division (D 34, p. 31), which, incidentally, employs about 55 Indians (D 34, p. 30).

2. Defendant. Sperry Rand is a large corporation which employs approximately 300 employees (D 34, p. 25), including no computer programmers (D 34, p. 25),

at its Executive Offices located at 1290 Avenue of the Americas, New York, New York, and which employs approximately 60,000 employees (D 34, p. 25), of whom thousands are computer programmers or analysts and at least 55 are persons of Indian national origin, at one or another of its 425 facilities operated throughout the United States. The criteria and standards for employment as a computer programmer or analyst depend upon the particular position available at the particular facility (D 18, Partial Answer to Interrogatory No. 2). Sperry Rand does not hire computer personnel at its Executive Offices. Sperry Rand receives 40-50 unsolicited employment inquiries a day at its Executive Offices (D 34, p. 26), screens them on the basis of the qualifications stated in the inquiry, refers some to one or another of its operating facilities for further consideration, and rejects the others by various form letters (D 34, p. 26).

3. Halder's Unsuccessful Employment Applications to Sperry Rand and Hundreds of Other Companies. Halder has unsuccessfully applied to hundreds of corporations for employment as a computer programmer, including three times to Sperry Rand at its Executive Offices and 14 other times to one or another of eight of Sperry Rand's

425 operating facilities in the United States. All three applications sent to the Sperry Rand Executive Offices were reviewed by Frank D. Adams (D 34, p. 2), Personnel Administrator for that facility, who testified at the trial. The 1968 and 1969 applications were referred to operating divisions, and Halder so notified (D 34, p. 27) -- Adams did not know what happened thereafter (D 34, p. 27) -- and the 1970 application, which consisted of a letter and a resume (Sp. Rand Ex. A) was rejected by a form letter (Sp. Rand Ex. B), because, Adams testified: "I just felt that the operating divisions would not have any need for Mr. Halder" (D 34, p. 29). Halder's national origin, religion, color and alienage played absolutely no part, Adams further testified, in his decision to send that rejection letter (D 34, p. 30).

4. Dismissal in 1974 of Charge Filed with EEOC in 1971. On February 23, 1971, Halder filed with the EEOC a charge alleging that Sperry Rand had discriminated against him because of his national origin in that he had "applied to Sperry Rand on various occasions, but have never been invited for an interview" (D 21, Ex. C). The EEOC investigated that charge -- confining its inves-

tigation to the three applications sent to Sperry Rand's Executive Offices in 1968, 1969 and 1970, and finding Halder's charge timely only as to the 1970 application (D 34, p. 28) -- and on June 17, 1974 dismissed it for "no reasonable cause" (D 21, Ex. D).

5. Commencement of Action; Complaint as Twice Amended. On July 18, 1974 Halder commenced this action (D 1). His complaint, as twice amended with Sperry Rand's consent, alleges that he sought employment from Sperry Rand three times at 1290 Avenue of the Americas, New York, New York and 14 other times at eight of Sperry Rand's operating facilities, and that Sperry Rand's failure to employ him was discrimination in violation of Title VII on the ground of his national origin (D 9).

6. Motion to Compel Answers to Interrogatories. On February 10, 1975 Halder served nine Interrogatories (D 17). Three of them, Nos. 1, 7 and 8, have been answered (D 18 and D 27), and are not involved in this appeal. In respect to the other six, Sperry Rand partially answered some of them (Nos. 2, 3 and 6) and objected to all six on the grounds of burdensomeness and irrelevance, and to two of the six (Nos. 2 and 3) on the ground of vagueness (D 18). Halder then moved,

without affidavit or brief, to compel Sperry Rand to answer them (D 19).

7. Partial Discovery Agreement Proposed by Sperry Rand and Rejected. Pursuant to Rule 33(c) of the Federal Rules of Civil Procedure Sperry Rand responded to Halder's motion by offering Halder the opportunity to inspect and copy certain business records containing some of the information, concededly far from all of it, requested by the disputed interrogatories. Specifically, and as stated in Sperry Rand's affidavit opposing the motion on May 12, 1975, prior to the return of the motion, an attorney for Sperry Rand called plaintiff, told him that Sperry Rand had no abstracts or compilations of the data he was seeking, and offered him the following partial discovery agreement in return for Halder's dropping his motion for the time being:

> "(A) Plaintiff would be permitted to examine all employment applications and related records located at Sperry Rand's Executive Offices at 1290 Avenue of the Americas, New York, New York. Plaintiff was told by Mr. Briton that this meant that he would be permitted to examine the nine file drawers of applications and correspondence from job applicants since January 1, 1972, and the two log books with data on all applicants since 1969, those who applied in person to 1290 Avenue of the Americas and those who applied by mail.
>
> "(B) Plaintiff would be permitted to copy at his expense all materials from among said records

covering (1) all persons whose national origin was India and (2) all persons who applied to Sperry Rand at the same three times plaintiff did for positions as computer programmers or analysts.

"(C) If, after examining and copying materials as indicated, plaintiff decided that he needed additional materials, he and we would discuss the matter in an attempt to work out further agreement without involving the Court." (D 21, par. 6, pp. 8-9).

Halder categorically rejected the offer, even after Sperry Rand's attorney explained to him that a rationale for it was that Halder had initially applied to Sperry Rand at 1290 Avenue of the Americas, and the EEOC had investigated those applications only (D 21, p. 8). Halder has never examined or asked to examine the offered records; he claims that "this offer made by the counsel for defendant is merely a gesture without substance ... more in the nature of an eyewash than anything else" (D. 24, pp. 7-8).

8. Denial of Discovery Motion; Interrogatories and Decision Quoted. On June 12, 1976 the District Court granted Halder's motion as to two interrogatories (Nos. 7 and 8), which Sperry Rand then answered (D 27), and denied the motion and sustained Sperry Rand's objections as to the six interrogatories, Nos. 2, 3, 4, 5, 6 and 9, involved in this appeal. The District Court divided the six interrogatories into two groups for purposes of its

decision. For this Court's convenience, and bearing in mind that the interrogatories are handwritten, we quote below the first group of interrogatories (Nos. 2 and 3) and the Court's decision as to them, then the second group (Nos. 4, 5, 6 and 9) and the Court's decision as to them.

Interrogatories 2 and 3

> "2) State the criteria and standards for employment as computer programmer and analyst by Sperry."
>
> "3) State the procedure for employment by Sperry."

Court's Decision Denying Motion to Compel Answers to Interrogatories 2 and 3

> "Interrogatories 2 and 3 ask defendant to state the standards it employs in hiring computer analysts and programmers, as well as the 'procedure for employment' that it uses. Defendant, correctly, objects to these interrogatories as being vague and burdensome. Defendant states that it has approximately 58,000 employees, several thousand of whom are computer programmers or analysts. In the partial answer it provided to these interrogatories defendant stated that the standards and procedures for employment depend upon the particular position available at a particular facility. This answer is sufficient. As framed by plaintiff, interrogatories 2 and 3 are so general that defendant must either provide all the information it has relative to its employment procedures, which would be unduly burdensome; or provide a speculative response to a more narrow question than that posed by plaintiff. Defendant need not be forced to guess at plaintiff's intention, or supply all its information relating to employment. The motion to compel answers to these interrogatories is denied."

Interrogatories 4, 5, 6 and 9

"4) With respect to each and every advertisement Sperry has inserted in publications to recruit computer programmers and analysts from June 1, 1969 to present, state:

A. Name and address of the publication;

B. Date of such advertisement;

C. Name and address of the operating division originating the advertisement;

D. Number of vacancies advertised;

E. Number of applications received;

F. Number of persons interviewed;

G. Number of persons hired."

"5) With respect to each and every computer programmer and analyst hired by Sperry at any time during the period from June 1, 1969 to present, state as to each such person:

A. Source of recruitment;

B. Name and address of operating division where such person was hired;

C. Name, address, telephone number, social security number and if alien, alien registration number of such person;

D. Date hired;

E. His/her academic training;

F. His/her professional experience;

G. His/her job duties and responsibilities;

H. His/her initial compensation;

I. His/her race and national origin;

J. Criteria and standards employed to select the person;

K. If terminated, date and reason for termination."

"6) State the total number of employees of Sperry and more particularly, the total number of computer programmers and analysts employed by Sperry with respect to each and every programmer and analyst, state:

A. Name and address of operating division where such person is employed;

B. Date hired;

C. Name, address, telephone number, social security number and if alien, alien registration number of such person;

D. His/her academic training;

E. His/her professional experience;

F. His/her job duties and responsibilities;

G. His/her compensation;

H. His/her race and national origin."

"9) State whether at any time since June 1, 1969 to present, any person of a minority race, ethnic group, religious group or national origin, has been denied employment by Sperry for any reason whatsoever. If so, state to each and every such person.

A. Name, address, telephone number, social security number, and if alien, alien registration number;

B. Date of denial;

C. Reason for denial."

Court's Decision Denying Motion to Compel Answers to Interrogatories No. 4, 5, 6 and 9

"These interrogatories are extremely broad in nature. Through these interrogatories plaintiff seeks detailed information concerning defendant's employees and its advertising practices, from June, 1969 to the present. Typical of these is interrogatory number 5. In this interrogatory, plaintiff asks defendant to specify the name, address, educational qualifications, race, national origin, salary, job description and date hired of every programmer and analyst hired by defendant since June 1, 1969.

Obviously, to provide this information would impose a substantial burden on defendant. In these circumstances, it is necessary to balance the burden which answering these interrogatories would place on defendant, against the value of the answers to plaintiff's case. See, Da Silva v. Moore-McCormack Lines, Inc., 47 F.R.D. 364 (E.D. Pa. 1969). In this respect, it is evident that the effort which would be required to gather and assimilate the information plaintiff requests far outweighs the limited probative value this information would have on his case. Id. Furthermore, even though the requested information is in defendant's control, he should not be forced to engage in extensive research and compilation, particularly when the purpose of the effort is to assist plaintiff in the preparation of his case, E.g., Fischer v. Porter Co. v. Sheffield Corp., 31 F.R.D. 534, 537-38 (D. Del. 1962). Instead, where the data is available to plaintiff, either by consent of defendant (as is the case here) or by means of the appropriate discovery motion [2] this party should assume the burden of

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/2 Provision for discovery and production of documents and records is made in Rule 34, F.R. Civ. P. The use of interrogatories was not intended to serve as a substitute for inspection of documents pursuant to Rule 34. Cinema Amusements v. Loew's Inc., 7 F.R.D. 318 (D. Del. 1947).

locating and assimilating the information he desires. H. K. Porter Co. v. Bremer, 12 F.R.D. 187 (N.D. Ohio, 1951).

The defendant has demonstrated that these interrogatories are unduly burdensome, and the motion to compel defendant to answer them is denied."

9. Motion for Reargument, and to Amend Complaint a Third Time; Motions Denied. On or about June 23, 1975 Halder moved, this time with an affidavit and a brief, for reargument of his discovery motion and for leave to file a third amended complaint (D 23 and D 24). His brief makes the following statements concerning the partial discovery agreement offered by Sperry Rand on May 12, 1975 and the District Court's reference to Rule 34:

"Counsel for Defendant asked him to come down to defendant's Executive Offices and examine and copy (at his own expense) the employment applications and related records (Rosenfeld affidavit of 5-14-75, page 8 Para 6) located at the said address. This offer made by the counsel for defendant is merely a gesture without substance. Because the defendant has no computer programmer at its executive offices (Rosenfeld Affidavit of 5-14-1975, Page 3, Para 2). Obviously, the counsel for defendant's offer was more in the nature of a eyewash 'than anything else.

"Furthermore, even if counsel for defendant asks plaintiff to visit all its 425 facilities in the United States (Rosenfeld Affidavit of 5-14-76, Page 3, Para. 2). And examine and copy (at plaintiff's expense) all its employment records. It would be an absurd proposition it will be physically beyond his means to visit

each facility. Besides neither time nor funds could allow such a search that can indeed by life-long. The plaintiff is severaly limited by his need for time in search for employment and funds to keep his body and sole together. The counsel for the defendant therefore clearly evades the issue in his thoughtless offer instead of presenting a feasible solution.

"The data is available to plaintiff under the provision of Rule 34 of the federal Rules of Civil Procedure for the production of documents and records (memorandum of Decision and Order of June 12, 1975, Page 5)

"Plaintiff wishes to submit that the provision of rule 34 should not be applicable to him. Reason and a sense of compassion should determine that when a plaintiff is appearing pro se, the where withal needed in the application of the provision (such as an office, equipment, etc.) is absent, it will be then a miscarriage of justice to invoke the rule 34.

"Therefore, it is plaintiff's submission that only option left open to him, who is appearing pro se, for discovery provision is the application of rule 33 of the Federal Rules of Civil Procedure, in this instance." (D 24, pp. 7-9).

His moving affidavit contains the following excuse for not having alleged color, religion and alienage as grounds of discrimination in his three prior complaints:

"[Plaintiff's] assumption was that the original charge of discrimination on the basis of national origin did in fact take into account his being non-white (color), non-christian (religion), and a non-citizen (alienage)" (D 23, par. 4, p. 3).

It is silent as to why he had not previously pleaded 42

U.S.C. § 1981. The District Court denied both motions on February 9, 1976 (D 29).

10. Notice of Consolidated Trial on February 10, 1976. On February 5, 1976, the District Court issued a written direction to Halder and Sperry Rand (and seven other Halder defendants) to appear for trial on February 10, 1976. The notice stated that "Default in appearance or refusal to proceed to trial may result in dismissal of the complaint or judgment" (D 28).

11. Halder's Failure to Proceed; Complaint Dismissed. On February 10, 1976 this action and the seven others came on for trial before the District Court. Sperry Rand and two other defendant companies stated that they were ready to proceed, but Halder refused to proceed, because of the District Court's denial of his discovery motion. He stated, in this connection, that "I have only one piece of document with me which says that they have hired a person who just came out of college with a bachelor's degree and a year of experience in industry" (Tr. 23), but that "once the discovery is complete I should be able to produce hundreds and hundreds of such documents, even thousands, and that's going to prove in the last six years they have hired hundreds and

hundreds or thousands of computer programmers who are less qualified" (Tr. 23). (He did not state, though it was the case, that in the eight months since denial of that motion, he had neither taken up Sperry Rand's offer to let him inspect and copy records at 1290 Avenue of the Americas, not, as the Court had indicated, requested production of documents pursuant to Rule 34.) Pursuant to the Court's direction:

> "Will ... Sperry Rand ... because this plaintiff comes in pro se, I want to make certain the record is clear on what was done here, even though you don't have the affirmative on it, I want you to put your cases in. Will you please do that. I want affirmative proof if you have it to support your defense as if he testified in the manner in which he related his claim" (Tr. 23-24),

Sperry Rand then put on the stand the person (Adams) who had received and acted upon the three of Halder's 17 applications for employment addressed to Sperry Rand's Executive Offices at 1290 Avenue of the Americas, New York, New York, and who testified concerning his handling of those three applications, and that Sperry Rand's Univac Division -- which manufacturers computers and thus would have the greatest need for computer programmers of Sperry Rand's operating divisions (D 34, p. 31) -- employs about 55 non-citizen Indians throughout the United States (D 34, p. 30-31). The District Court then dismissed his complaint "for the failure and refusal of the plaintiff to proceed" (D 34, p. 37). This appeal followed.

ARGUMENT

I

DENIAL OF THE MOTION TO COMPEL ANSWERS TO INTERROGATORIES WAS NOT AN ABUSE OF DISCRETION

The District Court's decision (D 22) denying the motion to compel answers to the six disputed interrogatories is in two parts. One part sustained Sperry Rand's objections to the two interrogatories (Nos. 2 and 3) asking Sperry Rand to state "the criteria and standards for employment" and "the procedure for employment," on the ground of their being vague and burdensome. That seems an unexceptional exercise of District Court discretion in discovery matters. The second part sustained Sperry Rand's objection, on the ground of their being unduly burdensome, to the four interrogatories asking Sperry Rand for detail as to advertisements for computer programmers from June 1, 1969* to date (No. 4), persons hired and employed as programmers during that period (Nos. 5 and 6), and "any person of a minority race, ethnic group, religious group or national origin ...

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* June 1, 1969 is the day after Halder arrived in this country from England.

denied employment by Sperry for any reason whatever" during that period (No. 9) (Sperry Rand had also objected to all six interrogatories as irrelevant; that ground of objection was not sustained.) That second part of the decision underlay Halder's refusal to proceed at the trial; as he stated:

> "Once the discovery is complete I should be able to produce hundreds and hundreds of such documents, even thousands, and that's going to prove in the last six years they have hired hundreds and hundreds or thousands of computer programmers who are less qualified" (D 34, p. 23).

The essential point of the District Court's decision -- "where the data is available to plaintiff, either by consent of defendant (as is the case here) or by means of the appropriate discovery motion [specifically under Rule 34] this party should assume the burden of locating and assimilating the information he desires" -- seems eminently correct. In Burns v. Thiokol Chemical Corp., 483 F.2d 300 (5th Cir. 1973), the plaintiff propounded interrogatories quite like Halder's. The defendant objected to them as irrelevant and unduly burdensome. Subsection (c) of Rule 33(c), F.R.C.P., giving an option to produce business records, was not then in effect (483 F. 2d at 300 n. 10). The district court sustained the objections (on which if either ground

it did not make clear (483 F. 2d 304)), and remanded the case with the following statement, pertinent to the instant case, as to the availability to the defendant of the option under Rule 33(c), to produce business records (483 F. 2d at 307):

> "Of course the particular details of the discovery process are committed to the sound discretion of the trial court. Knowing, by virture of our mandate, that the information is relevant, and therefore, discoverable, the judge may wish to require full answers to the interrogatories. But that is not his only option.
>
> Since his initial ruling in this case, a new rule, F.R.Civ.P. 33(c) has been promulgated. It gives Thiokol the option to 'specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries.'"

In the instant case, the District Court did not sustain any of Sperry Rand's objections on the ground of irrelevance to any of the interrogatories. Relevance or irrelevance of the sought-after information is therefore not a question upon this appeal. Instead, the District Court approved Sperry Rand's offer to produce business records for Halder's inspection -- specifically, "all employment applications and related records located at Sperry Rand's Executive Offices at 1290 Avenue of the

Americas, New York, New York". The offered records consisted of "nine file drawers of applications and correspondence from job applicants since January 1, 1972, and the two log books with data on all applicants since 1969, those who applied in person to 1290 Avenue of the Americas and those who applied by mail", and would unquestionally have provided plaintiff with a large amount of information requested by his interrogatories. The offered records, for instance, would have given plaintiff all the data furnished Sperry Rand's Executive Offices about themselves by all persons rejected for employment by Sperry Rand's Executive Offices since January 1, 1972, and the date of the rejection of all such persons. Such data, including the dates, is specifically requested, apparently for all of Sperry Rand's facilities, by plaintiff's interrogatory number 9.

This case falls within Rule 33(c). One, the answers to parts of plaintiff's interrogatories were ascertainable from business records at Sperry Rand's Executive Ofices at 1290 Avenue of the Americas, New York, New York. Two, the burden of ascertaining the answers was substantially the same for Halder as for Sperry Rand; indeed, the burden was lighter for Halder

because knowing what information he was most interested in would surely have made his search through the offered records swifter and more efficient than Sperry Rand's. Three, Sperry Rand specified the records from which the answers were ascertainable, and afforded Halder reasonable opportunity to examine and copy them, by the "partial discovery agreement" proposed to Halder by Sperry in May 1975. This case also falls, as the District Court noted under Rule 34.

The District Court's denial of Halder's discovery motion was not, under these circumstances, an abuse of discretion.

II

DISMISSAL OF THE COMPLAINT FOR FAILURE TO PROCEED WAS NOT AN ABUSE OF DISCRETION

This Court has stated that: "It is well settled that a dismissal with prejudice for failure to prosecute will not be reversed on appeal except where there is a showing of an abuse of that discretion", Michelsen v. Moore-McCormack Lines, Inc., 429 F.2d 394, 395 (2d Cir. 1970), referring to the discretion of a trial judge to grant or deny a continuance. That principle requires affirmance here.

Halder failed to proceed because, although some of his interrogatories had been answered and although he had been offered access to files which would have in part answered others of his interrogatories which had not been answered, he did not have any evidence to prove his case. His lack of answers to his interrogatories was due in significant part to his own failure to take up Sperry Rand's offer to him to let him inspect "all employment applications and related records located at Sperry Rand's Executive Offices at 1290 Avenue of the Americas, New York, New York", and to his further failure to request production of documents under Rule 34, as the District Court had indicated he could. Because Sperry Rand had made that offer, and because Halder could also have proceeded under Rule 34, the District Court denied his motion to compel Sperry Rand to answer interrogatories requesting in part the very information contained in those offered records.

There is in this case, thus, a major element of responsibility on the part of Halder for his own inability to proceed. This is not a case where dismissal for failure to proceed might be improper because the lack of evidence underlying the plaintiff's unwillingness to proceed was

not attributable to his own fault. See Brown v. Thompson, 430 F. 2d 1214, 1216-1217 (5th Cir. 1970). Rather, it is a case where the plaintiff had evidence available to him -- the trial in this case was noticed for a date nine months after Sperry Rand's May 1975 offer to Halder to let him examine and copy the records at 1290 Avenue of the Americas, and eight months after the Court's discovery decision being presently appealed -- but failed to pursue it. See Marshall v. Sielaff, 492 F.2d 917 (3rd Cir. 1974).

Halder failed to proceed. His inability to proceed was significantly his own fault. The District Court's dismissal for Halder's failure to proceed was not an abuse of discretion.

III

DENIAL OF THE MOTION TO AMEND THE COMPLAINT A THIRD TIME WAS NOT AN ABUSE OF DISCRETION

Halder's proposed fourth complaint would have added color, religion and alienage (to national origin) as grounds of discrimination against him by Sperry Rand, and it would have added the Civil Rights Act of 1866, as amended, 42 U.S.C. § 1981, to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e. His affidavit in support of his motion for leave to file

that complaint said, however, only the following:

> "4. Plaintiff asks leave to amend his complaint to include specifically a charge of discrimination on grounds of his color, religion, and alienage. Since his assumption was that the original charge of discrimination on the basis of national orgin did in fact take into account his being non-white (color), non-christian (religion) and a non-citizen (alienage)."

That statement appears to contradict Paragraph 10 of his second amended complaint, which is as follows (D 9, p. 9):

> "10 Defendant's conduct is discriminatory with respect to which of the following:
>
> A) _____ Your race
> B) _____ Your color
> C) _____ Your sex
> D) _____ Your religion
> E) ___✓___ Your national origin"

Taking Halder at his word, however, there was no prejudice to him in being denied leave to add those three new grounds, because, according to him, proof of his national origin would also have been proof of discrimination on those three grounds.

Sperry Rand opposed the motion primarily on the ground that Halder's rejection of Sperry Rand's proposed partial discovery agreement and his failure to examine the records made available to him at 1290 Avenue of the Americas, put him in the untenable post-

ure of failing and refusing to pursue means which the District Court had just held available to him to discover evidence in support of his single-ground (national origin) complaint, while at the very same time moving to amend that complaint -- a third time -- by alleging three new grounds of discrimination by Sperry Rand (color, religion and alienage).

The District Court denied the motion on the strength of its denials of Halder's similar motions in Halder v. RCA Corp., 74C 1375 (E.D.N.Y. Feb. 9, 1976), and Halder v. Avis Rent-A-Car System, 74C 1552 (E.D.N.Y. Jan. 22, 1976).

In RCA, Halder had moved to amend a Title VII national-origin complaint so as to state a claim of national-origin discrimination under 42 U.S.C. § 1981. The District Court denied the motion on the basis of its analysis of legislative history and court decisions. In Avis, Halder had moved to amend a Title VII national-origin complaint so as to add claims of discrimination under 42 U.S.C. § 1981 because of his color, religion and alienage. The District Court denied the motion, insofar as it was broader than the motion in the RCA case, on the following grounds:

"Plaintiff filed a claim with the EEOC against Avis Rent-A-Car System, Inc. ("Avis"), in 1971. He claimed that Avis failed to interview or hire him because of his national origin (plaintiff was born in India). The EEOC investigated and found no evidence to support the claim. Plaintiff requested a Notice of Right to Sue and then commenced this action. Plaintiff alleged that defendant's failure to interview or hire him was due to plaintiff's national origin and that this discrimination violated 42 U.S.C. § 2000e-5.

The present motion is plaintiff's second attempt to amend the complaint./1 Plaintiff now seeks to add a cause of action under 42 U.S.C. § 1981 because of alleged discrimination against him because of his color, religion and alienage./2 The factual setting out of which this action grew has not changed at all. Plaintiff offers no facts /3 to substantiate these new claims of discrimination.

/1 On February 25, 1975, this court permitted plaintiff to add additional dates when defendant allegedly discriminated against plaintiff.

/2 In another action, this court denied a request by plaintiff to amend his complaint to include a cause of action under 42 U.S.C. § 1981 because § 1981 does not give redress to discrimination because of national origin. Halder v. RCA Corp., 74-C-1375 (E.D.N.Y. April 25, 1975). Since that decision plaintiff's requests to amend his various complaints have all added discrimination because of color, religion and alienage to support his § 1981 action.

/3 Plaintiff's original complaint claimed that he was allowed into this country because there was a need for people with his skills. Plaintiff responded to defendant's advertisements with letters and resumes. He received either no response to his letters or letters saying that his resume had been received, but there was no position for a person with his qualifications. Plaintiff contends that defendant had positions available for a person with plaintiff's qualifications and that the only conclusion he could reach was that Avis must have discriminated against him because his name was of Indian extraction. Plaintiff made no mention of color, religion or alienage and now offers no theory as to how defendant might have been able to ascertain plaintiff's color, religion or citizenship in order to discriminate against them.

> Plaintiff has subjected defendant to charges of discrimination because of plaintiff's national origin since May, 1971, when he filed charges with the EEOC. Defendant has answered to and prepared its case against charges of discrimination based on national origin. Plaintiff has a full and adequate remedy under 42 U.S.C. § 2000e-5. Justice will not be hindered by refusing plaintiff's request to amend his complaint."

The District Court's holding in RCA that § 1981 does not give a cause of action for national-origin discrimination was correct. Kurylas v. U.S. Dept. of Agriculture, 373 F. Supp. 1072, 1075 (D.D.C. 1974). See Agnew v. City of Compton, 239 F.2d 226, 230 (9th Cir. 1957); Olson v. Rembrandt Printing Co., 375 F. Supp. 413, 417 (E.D. Mo. 1974); Abshire v. Chicago & E. Ill. R.R., 352 F. Supp. 601, 605 (N.D. Ill. 1972); Schetter v. Heim, 300 F. Supp. 1070, 1973 (E.D. Wis. 1969); Georgia v. Rachel, 384 U.S. 780, 791 (1966) But see Sud v. Import Motors Ltd., 379 F. Supp. 1964, 1971 (W.D. Mich. 1974).

The District Court's reasons for not permitting Halder to broaden his complaint in Avis also apply in this case. This is Halder's third attempt to amend his complaint against Sperry Rand. The factual setting out of which this action grew has not changed at all. He offers in his moving affidavit no facts to substantiate the new claims (of color, religious and alienage dis-

crimination). He made no mention of his color or religion (as he did of his alienage) in the resume sent to Sperry Rand (Sp. Rand Ex. A) and now offers no theory as to how Sperry Rand might have been able to ascertain his color or religion in order to discriminate against him.* The only reason offered in his moving affidavit for not having alleged color, religion and alienage discrimination in his first three complaints -- that he assumed they were taken into account by his original charge of national-origin discrimination -- is openly contradicted by Paragraph 10 of his second amended complaint; he checked the blank for discrimination with respect to "Your national origin," he left unchecked the blanks for discrimination with respect to "Your" race, color, sex and religion (D 9, p. 9). He has subjected Sperry Rand to charges of discrimination because of his national origin since February 1971, when he filed such charges with the EEOC. Such national-origin charges were all that the EEOC investigated. Sperry Rand has answered to and prepared its cases against charges of discrimination based on national origin. Halder has

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* Halder's 11th application to a Sperry Rand operating facility was in person, and occurred on March 27, 1974 (D 9, par. 5.0, p. 5).

a full and adequate remedy under Title VII. In addition, there is present in this case, as there was not in Avis, the factor that Halder has failed and refused to pursue the means held available to him by the District Court to discover evidence in support of his single-ground (national origin) complaint.

Even more so than in Avis, it can be said that justice was not hindered by the District Court's refusal of Halder's request to amend, a third time, his complaint against Sperry Rand.

CONCLUSION

The District Court's judgment should be affirmed.

Dated: July 19, 1976
New York, New York.

Respectfully submitted,

POLETTI FREIDIN PRASHKER
FELDMAN & GARTNER
Attorneys for Sperry Rand
Corporation
777 Third Avenue
New York, New York 10017
(212) 688-3200

Of Counsel,
Eric Rosenfeld.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

76-7145

BISWANETH HALDER

Plaintiff-Appellant

against

SPERRY RAND CORPORATION

Defendant-Appellee

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

The undersigned being duly sworn, deposes and says:

Deponent is not a party to the action, is over 18 years of age and resides at 177-20 106th Avenue Jamaica, New York

That on July 19, *19*76 *deponent served the* ~~annexed~~ two copies of appellees brief

on Biswaneth Halder, appearing pro. se

attorney(s) for

in this action at 173-17 65 Avenue, Fresh Meadows, N.Y. 11365

the address designated by ~~*said attorney(s)*~~ *for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in* ~~*a post office*~~ *official depository under the exclusive care and custody of the United States Postal Service within the State of New York.*

Sworn to before me this
19th day of July, 1976

Eric Douglas Witkin

ERIC DOUGLAS WITKIN
Notary Public, State of New York
No. 31-4508330 Qual. in N. Y. Co.
Term Expires March 30, 1977

Herbert Davis

The name signed must be printed beneath

Herbert Davis
177-20 106th Avenue
Jamaica, New York

C 321—Affirmation of Service of Papers by Mail.
Affidavit of Service By Mail on Reverse Side.

Index No.

Plaintiff

against

Defendant

ATTORNEY'S AFFIRMATION OF SERVICE BY MAIL

STATE OF NEW YORK, COUNTY OF ss.:

The undersigned, attorney at law of the State of New York affirms: that deponent is attorney(s) of record for

That on 19 *deponent served the annexed*

on
attorney(s) for
in this action at
the address designated by said attorney(s) for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in—a post office—official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

The undersigned affirms the foregoing statement to be true under the penalties of perjury.

Dated

The name signed must be printed beneath

Attorney at Law